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May 26, 1983

Thomas B. Cronmiller, Esquire
Energy Program Coordinator
Water Resources Board
37 Pleasant Street
Concord, New Hampshire 03301

Re: KELLEY FALLS LEASE TERMINATION

Dear Mr. Cronmiller:

By a memorandum dated March 9, 1983, you asked our opinion on several matters relative to the Kelley Falls Dam Lease ("Lease") between the Water Resources Board ("Board") and Renewable New England ("RNE"). By subsequent telephone conversations, you limited your inquiry to the following questions:

1. May the Board and RNE, by mutual agreement, rescind the Lease?
2. In the event the Board and RNE rescind the Lease, may the Board return the Earnest Money Deposit given to the Board by RNE under Paragraph 11 of the Lease?
3. May the Board waive "Prelicense Rent" billed to RNE under the Lease?
4. May the Board negotiate a new lease of the Kelley Falls property with Hydro Resources Corporation ("HRC")?



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5. Is Governor and Council approval required for all or some of the above?

Our answers to the above inquiries, summarized, are as follows:

1. The Board and RNE may, by mutual consent and with Governor and Council approval, rescind the Lease.
2. The Board may retain such part of the Earnest Money Deposit given the Board under Lease Paragraph 11 as is needed to reimburse the Board for the cost of expenses reasonably incurred by it in the course of the project. Governor and Council approval is not needed for this action.
3. The Board may, with Governor and Council approval, waive "Prelicense Rent" otherwise due under the Lease.
4. The Board may enter into negotiations to lease the Kelley Falls Dam with HRC. However, Governor and Council approval would be needed before any negotiated lease of this property to HRC would be valid.

The above opinion relates to a Lease entered into between the Board and RNE on January 26, 1981. The Lease was approved by the New Hampshire Governor and Council on February 25, 1981. The Lease was entered into with the expectation by all parties that RNE would file for and obtain from the U.S. Federal Energy Regulatory Commission ("FERC") a permit to develop the Kelley Falls site for hydroelectric power production purposes. This expectation has not been fulfilled and RNE's failure to secure a FERC permit for Kelley Falls is what triggered the parties' desire to terminate the subject Lease.

- I. The Board And RNE May, By Mutual Assent, Terminate Or Rescind The Lease. Governor And Council Approval Is Required For The Termination To Be Valid.

It is settled law that the parties to an existing contract may, by agreement, rescind the contract and thereby cancel same.
2 Black On Rescission and Cancellation, § 522 (2nd Ed. 1929); 17 Am.

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Jur. Contracts § 490 (1964). It is said in this regard, however, that "[t]o effect a rescission by subsequent mutual agreement, it is necessary that the contract to rescind should receive the free and understanding consent of both or all the parties to the original contract." (Emphasis added.) Black, supra at § 525.

Applied to the facts of this case, the above-quoted rules of law are authority for the conclusion that the Board and RNE may, by mutual agreement, rescind their Lease Agreement of January 26, 1982. To be effective, however, the rescission must be approved by the Governor and Council. Even though the Governor and Council were not formal parties to the Lease, their approval of the Lease was required by RSA 481:8. Since Governor and Council approval in such situations is analogous to obtaining the consent of a party to a contract, the above-cited rules of law are persuasive authority for requiring Governor and Council approval of any rescission of the Lease.

II. The Board May Retain That Portion Of The Earnest Money Deposit That Will Compensate It For The Cost Of Expenses Reasonably Incurred By It In The Course Of The Kelley Falls Project.

Paragraph 11 of the Lease provides that:

Earnest Money - Immediately upon the execution of this lease by Lessor, Lessee shall deposit with the Lessor an amount as determined by the formula shown below. This deposit shall be held in an interest bearing account. Said deposit shall be forfeited and the proceeds of the amount of said deposit with accrued interest shall be payable to Lessor in the event that Lessee defaults under the terms of this lease prior to issuance of the FERC license, or is unable to obtain the FERC license within five (5) years from the effective date of this lease. Upon the date of issuance of the FERC license, the deposit shall be returned to the Lessee with the accrued interest thereon being payable to the Lessee. In the event that the FERC does not issue a license for the project through no fault of the Lessee then the Lessor shall return the Earnest Money Deposit minus any expenses reasonably incurred by the Lessor as a result of its participation in this project.

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For the purpose of this subparagraph,
Earnest Money Deposit shall be calculated in
accordance with the following formula:

$$\text{E.M.D.} = \text{Inc.} \times 1,500 \times .005,$$

Where E.M.D. = Earnest Money Deposit, and

Inc. = Proposed Total Installed Capacity
at the Facility stated as the name
plate rating in kilowatts for the
generating equipment.

(Emphasis added.)

The language of Lease Paragraph 11 is clear and unambiguous. It requires the Board to return to RNE all of the Earnest Money Deposit paid to the Board under the paragraph plus accrued interest in the event RNE fails to obtain a FERC license. It further provides, however, that the Board may deduct from such payment any expenses reasonably incurred by the Board as a result of its participation in the Kelley Falls Project.

In this regard, the Board should note that, generally speaking, the effect of a rescission "is to extinguish the contract ... so effectually that in contemplation of law ..." it never existed. 17 Am. Jur.2d Contracts § 516 (1964). "Whether the mutual rescission of a contract operates as a waiver and release of the rights of the parties thereunder depends on the intention to be determined from the agreement of rescission, construed in the light of the attending circumstances." Id. at 517; Black at § 535.

It follows from the above that any instrument of rescission entered into between the Board and RNE should clearly spell out what rights under the Lease or portion of the Earnest Money Deposit, if any, the Board wishes to retain.

III. The Board May, With The Consent Of The Governor
And Council, Waive "Prelicense Rent" Billed To
RNE Under The Lease.

Waiver is defined as the "voluntary relinquishment of a known right." United States Fidelity & Guaranty Co. v. Kancer, 108 N.H. 450, 452 (1968). A waiver must be granted by one capable of binding himself. 44A Words and Phrases 315 (1955) citing Am. &

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English Encyclopedia of Law, P.525. This being so, the Board may waive its right to the "Prelicense Rent" due it under the Lease. Governor and Council approval is needed for the waiver to be effective, however, because Governor and Council approval was needed to make the Lease binding in the first instance. Note is made here that any agreement of rescission entered into between the Board and RNE should set forth in detail the Board's rights relative to "Prelicense Rent." Failure to address this topic may result in a waiver of the Board's right to collect the rent by operation of law. See discussion, supra at P.4.

IV. The Board May Negotiate A New Lease Of The Kelley Falls Dam With HRC. Any Lease Resulting From These Negotiations Will Need Governor And Council Approval To Be Effective.

RSA 481:3 gives the Board broad powers to develop New Hampshire's hydro electric power potential. This grant of power includes the power to negotiate with private corporations relative to the prospective development of State-owned land for hydro development purposes. All contracts entered into by the Board for the construction of hydro projects must be approved by the Governor and Council. RSA 481:8. Consequently, the Board may negotiate a lease of the Kelley Falls Dam with HRC but any lease entered into between these entities must be approved by the Governor and Council to be valid. Naturally, the existing Lease should be rescinded before a second lease of the Kelley Falls Dam is made.

If you have any questions with regard to the above, please let me know.

Very truly yours,

Robert P. Cheney Jr.
For Edward L. Cross, Jr.
Assistant Attorney General
Environmental Protection Division

ELC, JR./tlr
83-27-I